United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1213

To be argued by
JESSE BERMAN

ORIGINAL
and proof of service

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

JUAN DANIEL GONZALEZ, JR., : Docket No. 74-1213

Appellant. :

----------x

BRIEF FOR APPELLANT GONZALEZ

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
NEW YORK

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

JUAN DANIEL GONZALEZ, JR., :

Appellant. :

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ISSUES PRESENTED

1. Whether the induction order issued to appellant was invalid because he had been administratively rejected as unacceptable under army standards at his preinduction examination.

2. Whether the Government failed to adequately respond to appellant's motion concerning the disclosure of electronic surveillance and whether such failure requires a remand.

3. Whether it was improper and irrational for the court not to sentence appellant as a young adult offender after finding that he would benefit by such treatment.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (Costantino, J.), rendered October 11, 1973, convicting appellant after trial by the court of failure to report for induction [50 U.S.C. App. §462(a)] and sentencing him to three years suspended sentence and probation.

Timely notice of appeal was filed and this Court, on February 20, 1974, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently serving his sentence of probation.

B. Statement of Facts*

In October 1965 while appellant was a full-time student at Columbia University, he registered with Selective Service Local Board Number 47 in Brooklyn, N.Y., and received a student deferment until he was due to graduate in 1968. In November of 1968, he was given a 1-A classification which was unsuccessfully appealed to the State Appeal Board.

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*The Statement of Facts draws heavily upon the language of the court's opinion, 364 F. Supp. at 1177-1178, which is reproduced in its entirety in Appellant's Appendix.

The Local Board scheduled appellant for a pre-induction examination on March 18-19, 1969, to determine whether he was fit for military service as required by 32 CFR §1628.10. Appellant's Selective Service file indicates that before his examination the Selective Service was aware that he was subject to pending criminal charges in state court, criminal trespass and disorderly conduct, arising out of activity which occurred on February 2, 1968. These charges were not disposed of until July 16, 1969, when the appellant pleaded guilty and received a conditional discharge.

At the examination, appellant was found to be both physically and mentally acceptable. However, he was determined to be an "Administrative Reject" and hence "morally" unacceptable as a result of the pending criminal charges. Although the psychiatrist's report states that appellant told him that the charges had been dropped, it was determined that in fact these charges were still pending. A form in the file entitled "Processing Sheet AFEES" (Armed Forces Examining and Entrance Station) dated March 18, 1969, and bearing appellant's register number (144) is stamped "Administrative Reject." The sheet also contains the following note:

> Reg[istrant] is presently awaiting trial 29 Apr 69 for Crim. Trespassing & Dis. Con. Verified per telephone Attorney David LaBelle N.Y.C. 19 Mar 69.*

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*See Appellant's Exhibits Folder.

DD Form 47, dated March 10, 1969, indicates that the required "moral" waiver was not attached.

Nevertheless, it appears that a clerical error was made and a Statement of Acceptability (DD Form 62) was subsequently sent appellant. In November 1970, appellant's draft lottery number of 171 was reached and he was scheduled to report for induction on November 19, 1970. Appellant failed to report.

Trial by jury was waived and the case was tried to the court on May 9, 1973. At trial appellant's defense was that the induction order was invalid. (See Point I, infra.) Prior to trial a wiretap motion was made which was renewed during the trial and at the pre-sentence and sentencing hearings. The facts concerning this motion and the basis for it are detailed in Point II, infra. Appellant was convicted on October 11, 1973, a few days prior to his 26th birthday. However, the court refused to sentence him as a Young Adult Offender and instead sentenced him to probation as an adult under 18 U.S.C. 3651. (See Point III, infra.) Appellant is presently serving this sentence.

ARGUMENT

POINT I

THE INDUCTION ORDER ISSUED TO APPELLANT WAS INVALID BECAUSE HE HAD BEEN ADMINISTRATIVELY REJECTED AS UNACCEPTABLE UNDER ARMY STANDARDS AT HIS PREINDUCTION EXAMINATION.

The induction order issued to appellant was invalid and his conviction for failure to report for induction pursuant to that order must be reversed because appellant's "moral" fitness had been adversely determined prior to the issuance of the induction order.

The Selective Service statute, 50 U.S.C. App. §454(a), provides that:

> No person shall be inducted into the Armed Forces... until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense.

32 CRF §1628.10 further requires that:

> Every registrant, before he is ordered to report for induction ... shall be given an armed forces physical examination under the provisions of this part. . .
>
> (Emphasis added)*

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*Significantly, §1628.10, supra, requires that a registrant be given an Army physical examination not merely prior to induction, but rather, prior to being ordered to report for induction.

And 32 CFR §1631.7(a) explicitly requires that a determination of acceptability under Armed Forces regulations be made before a valid induction order can be issued:

> [T]he Executive Secretary or clerk, if so authorized, or a local board member shall select; as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I-A or Class I-A-O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction.
> (Emphasis added)

Once a registrant has properly been found acceptable, he will still have the opportunity, at the time of induction, to assert any newly-incurred disabilities, i.e. new illnesses or other grounds for rejection which have arisen since his pre-induction examination. Thus, as to all claims in existence at the time of the pre-induction examination, and brought to the Army's attention at that time by the registrant, the registrant has adequately exhausted his administrative remedies. The date of induction is reserved only for new claims, and not for re-assertion of claims of disability which the Army has already heard and rejected.

Conversely, if the Army wants to re-evaluate the acceptability of registrants it had previously rejected, it can not do so by ordering them down for actual induction, but may re-evaluate them at a second pre-induction examination, §1631.7(a), supra.

Induction notices and induction-day examinations and possible re-evaluations are thus reserved solely for those who have previously passed the Army's examination, and not for those, like appellant, who have failed, Id.

It is evident that Selective Service regulation §1631.7(a) incorporates the standards for acceptability established by the Armed Forces regulations and that a determination of acceptability by these standards is essential before the issuance of an induction order can be authorized.

Army Regulation 601-270, Ch 3-9 provides as follows:

> c. Criminal charges filed and pending.
> (1) Men who have criminal charges filed and pending against them alleging a violation of State, Federal, or territorial statute normally are unacceptable... The statement "Suggest reevaluation of moral acceptability upon final dispositon of criminal charges" will be entered in the remarks section, DD Form 62 (Statement of Acceptability), for registrants found disqualified for induction on the basis of this paragraph.
> (Emphasis added)

There can be no question that appellant was found unacceptable under this section at his pre-induction examination.

Appellant's "Processing Sheet AFEES" (Item 24 in the Index to appellant's Selective Service file)* bears a rubber-stamp entry, "ADMINISTRATIVE REJECT," in inch-high letters, near the caption "Moral Waivers," and the following notation appears at the bottom

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*See Appellant's Exhibits Folder.

of the Processing Sheet:

> Reg[istrant] is presently awaiting trial 29 Apr 69 for Crim. Trespassing & Dis. Con. Verified per telephone Attorney David LaBelle N.Y.C. 19 Mar 69.

In addition, appellant's "Record of Induction" (Item 25) from the same AFEES examination, includes the following entries under category 13:

> (a)...Criminal trespass, Disorderly Conduct/Pending/New York Criminal Court
>
> (b)Now in custody of law? YES. If answer if "YES", is necessary release or waiver attached? NO.*

There is thus no question whatsoever that appellant was "morally" unacceptable because he had "criminal charges filed and pending" (AR 601-270, Ch 3-9(c)(1), supra), and, therefore was ineligible for induction.

Although Army regulations permit the induction of an individual with pending charges if a moral waiver procedure is followed as provided by AR 601-270, Ch 3-9, it is apparent that the decision was made at appellant's pre-induction examination not to seek any such waiver in his case, but rather to simply find him "morally unacceptable", based on his verified pending case, and thus he was "administratively rejected" as ineligible for induction.

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*The language of entry number 13(b) supra, which speaks of whether the necessary waiver has been attached, clearly rebuts the assertion of the District Court at 364 F. Supp. 1177, that the "moral waiver" as to pending charges is merely optional.

It is irrelevant that, as stated in AR 601-270, Ch 3-8:

> The moral waiver program is for the benefit of The Armed Forces; i.e. to screen out those individuals whose civil offense records reflect they are likely to be disciplinary problems after entry into the Armed Forces,

for in appellant's case the Army apparently deemed his pending case important enough to await its disposition in the state courts.

We therefore, in this case, never have to reach the question of whether the Army can, at a pre-induction exam, accept a registrant with a pending criminal case without first seeking a moral waiver, since the Army clearly decided to reject appellant, not to accept him.

United States v. Brooks, 415 F. 2d 502 (6th Cir., 1969), cited by the Court is clearly distinguishable from the instant case. In Brooks, the alleged pending criminal charge was never the basis for a finding of unacceptability. Moreover it appears that in Brooks the charge which was over three years old was no longer pending, and that the commanding officer of the induction center in his investigation by letter and telephone, determined that the charge had been dismissed or that prosecution had been abandoned. Thus, in Brooks, the Ch 3-8 waiver procedure either did not apply or, if it did, the commanding officer's exhaustive investigation was tantamount to a formal waiver procedure.

Appellant, unlike the registrant in Brooks, was found unacceptable at pre-induction after careful verification that there were in fact pending criminal charges. Thus, no waiver or its equivalent was sought.

The Court's reliance (at 364 F. Supp 1177-1178) on the fact that the AFEES psychiatrist's report includes appellant obviously mistaken assertion that his criminal charges "had been dropped" ignores the ultimate fact that the Army had verified, through appellant's attorney, that those charges were still pending.

We would indeed hope and assume that the Army officer called upon to evaluate the "moral" component of each registrant does not take it upon himself to pry into the psychiatrist's or other docotrs' reports, made in connection with the evaluation of the registrant's "physical" components.

But even if, perchance, in this instant case, the "moral" evaluating officer happened to see the psychiatrist's report on appellant, it is clear that the officer believed the attorney's statement that the charges were still pending and that he ignored appellant's belief that the charges had been dropped, because that same evaluating officer stamped appellant's file, "Administrative Reject," and cited the two pending cases. (See Item 24 in the Exhibits Folder).

Similarly, the forwarding of a Statement of Acceptability (Form DD 62) was clearly merely a clerical error in view of the facts as noted above which show that appellant was an "Administrative Reject". In any event, 32 CRF 1631.7(a) requires not only the mailing of the DD 62, but also that the registrant actually has "...been found acceptable for service in the Armed Forces..."

Thus, to sum up, appellant's induction order was invalid because he had been administratively rejected at his pre-induction examination. Whatever appellant might have said to the psychiatrist played no part in that administrative rejection. The Brooks case is distinguishable because the registrant in that case had never been rejected. And finally, the Army having accepted appellant's attorney's verification of the pending charges, and the induction order having thus been legally void ab initio, there was no need for appellant to attempt to re-exhaust this question on the induction date.

The judgment should be reversed and the indictment dismissed.

POINT II

THE GOVERNMENT'S FAILURE TO ADEQUATELY RESPOND TO APPELLANT'S MOTION CONCERNING THE DISCLOSURE OF ELECTRONIC SURVEILLANCE REQUIRES A REMAND

The record in this case presents to this Court another example of a "cavalier, carefree and careless attitude towards the conducting of electronic surveillance" by the prosecutors in this Circuit. United States v. Huss, 482 F.2d 38,52 (2d Cir.1973).

In a lengthy motion and brief filed prior to trial, appellant made timely demands for disclosure of whether the government had engaged in electronic surveillance of places where he had expectations of privacy, or of his conversations, or of his attorney's conversations.* The motion set forth in detail the addresses and phone numbers of places where the defendant had expectations of privacy and of the places where defendant's attorneys had expectations of privacy. On numerous occasions prior to and during the trial, appellant's counsel orally restated the motion and pointed out the manner in which the government's reply

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* See Defendant's Motion for Disclosure of Electronic Surveillance, for Pre-Trial Hearing to Suppress Evidence, and to Dismiss and Defendant's Memorandum in Support of Motion for Disclosure of Electronic Surveillance for a Pre-Trial Hearing to Suppress Evidence and to Dismiss the Indictment, filed 12/22/72, document 10 and 11 in the Index to the Record on Appeal.

was defective. * To date, the government has not adequately responded to these demands for disclosure. **

It was not fanciful for appellant to believe that his phones or those of his attorneys were wiretapped. In an affidavit submitted with the motion, appellant stated that he was a member of the Central Committee of the Young Lords Party (Puerto Rican Revolutionary Workers Organization), which has as one of its aims the liberation of Puerto Rico. Such groups are frequently the targets of intensive surveillance and wiretapping by the government. In fact, eighteen (18) agents of the Federal Bureau of Investigation arrested appellant, searched the entire building where the Young Lords Party had their offices and seized numerous internal documents belonging to the Young Lords Party. A factual showing of surveillance as strong as this requires an unequivocal affirmance or denial

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* T. of Feb.2,1973 at 28-35; T. of March 26, 1973 at 14-19; T. of October 19, 1973 at 3-15; T. of Feb. 8, 1974 at 3-4.

** A defendant is entitled to know whether or not the Government "unlawfully overheard conversations of .... himself or conversations occurring on his premises, whether or not he was present or participated in those conversations" Alderman v. United States, 394 U.S. 179 (1969); 18 U.S.C. §2512. Moreover, the Government must disclose whether or not any warranted surveillance was employed, so that the lawfulness of such surveillance can be tested against the strict requirements of 18 U.S.C. §2510, et seq. And even if such surveillance is found to be legal a defendant is entitled to know the contents of such surveillance as such contents might be exculpatory or contain his own statements. Brady v. Maryland,

(Continued on next page)

of electronic surveillance; no such unequivocal answer was given to appellant's motion.

The government's entire response to appellant's detailed requests is contained in a brief letter from the Internal Security Division, dated March 7, 1973. * When measured against the cases decided in the area, numerous and glaring inadequacies appear in the representations contained in the letter:

(1) The letter makes no mention of whether or not the conversations of appellant's attorneys were overheard. Appellant specifically set forth the names, addresses and phone numbers of the three attorneys who helped defend him in this case. The government is required to undertake an inquiry with regard to any possible electronic surveillance of these attorneys. Russo v. Byrne, 409 U.S. 1219 (1972) Douglas, Cir. J); United States v. Alter, 482 F.2d 1016, 1026 n.16 (9th Cir. 1973); Coplon v. United States, supra.

(Continued from preceeding page)
373 U.S. 83 (1963); Fed. R. Crim. P. 16(a) (1).
Moreover, the Sixth Amendment and the attorney-client privilege protect the confidentiality of the appellant's attorney's conversations and requires the government to disclose any surveillance of that attorney's conversations. e.g. Coplon v. United States, 191 F.2d 749 (D.C.Cir. 1951).

* See minutes of 3/26/73, at p.18.

For if the conversations of these attorneys were overheard, appellant's Sixth Amendment rights have been violated and he would be entitled to a new trial. Black v. United States, 385 U.S. 26 (1966); O'Brien v. United States, 386 U.S. 345 (1967).

(2) The letter does not unequivocally affirm or deny surveillance as to all telephones of appellant to which he has standing, nor does it state the time periods for which the telephones were checked. Appellant has standing with regard to any conversation occurring on premises where he has an "expectation of privacy" Katz v. United States, 389 U.S. 347(1967); Alderman v. United States, supra. Appellant specifically set forth in his motion the addresses and phone numbers of these premises in Exhibit B to his motion.

The letter states only that there was no surveillance of "conversations occurring on premises known to have been owned, leased, or licensed by him ....." As is readily apparent, premises "owned, leased, or licensed" would not encompass all those premises listed by appellant where he had "expectations of privacy." For example, appellant has standing to object to the electronic surveillance of the office of the Young Lords Party, yet this is not a premise that he owns, leases or licenses. See e.g. United States v. Smilow 472 F,2d. 1193 (2d Cir.,1973) (standing to object to conversation at Jewish Defense League Office).

(3) Because of the Government's sordid history

of non-disclosure of electronic surveillance, all courts now require that denials of such surveillance be made by affidavit indicating the nature of the inquiry made to discover surveillance records; by whom such inquiries were made; the agencies inquired of; the names, telephone numbers, and dates of the checks, and the date of the inquiry. E.g., United States v. Alter, supra; Korman v. United States, 486 F. 2d 926 (7th Cir., 1973); In re Grumbles, 453 F. 2d 119 (3rd Cir.,1971); United States v. Menz, Crim. No. 2144 (D.Del).

None of this was done in the instant case.

(4) Possibly the most egregious omission from the government's reply to appellant's motion is the failure to affirm or deny with regard to whether there were any overhearings of the appellant through unwarranted national security wiretaps.

The letter from the Internal Security Division carefully confines itself to denying wiretapping conducted "pursuant to Title III of Public Law 90-351," which would include only warranted wiretapping. However, it is much more likely, considering the political nature of this appellant's activities, that he was subjected to warrantless national security surveillance.

This omission should not be overlooked by this Court; the government should be ordered to inquire as to whether this appellant was subjected to or overheard on national security wiretaps.

On the basis of this record, the only avenue

open to this Court is a remand of this case so that the prosecution can make the adequate inquiry required to determine whether appellant's conversations have been overheard or subjected to electronic surveillance.

Courts now require this detailed denial or affirmance of electronic surveillance because of the Government's history of inaccuracy and untruthfulness. Late admissions of wiretapping and remands have occurred in scores of cases, and this Circuit has not been unaffected *

In United States v. Smilow, supra, this Court excoriated the Government's failure to make an adequate search for wiretaps, where the wiretap was not discovered until the case reached the Supreme Court:

> "If government agencies are going to employ such surveillance techniques, responsibility for accurate description to the courts of the results of these efforts rests with those who make the report. See 18 U.S.C. §3504..... We trust, in the future, the Government will be more thorough in the investigation of such matters." (Id. at 1194)

This case clearly presents another potential Smilow situation. A remand is required for purposes of determining the extent of the electronic surveillance of appellant and his attorneys.

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* E.g., United States v. Friedland, 316 F. Supp. 459 (S.D.N.Y.,1970,aff'd. 441 F.2d 855 (2nd Cir.), cert. denied, 404 U.S. 867 (1971); United States v. Derist, 277 F. Supp. 690, 702 (S.D.N.Y.), aff'd 384 F.2d 889 (2d Cir.1967), cert. denied, 394 U.S. 244 (1969); Schiapani v. United States, 315 F. Supp 253 (E.D.N.Y. 1970), aff'd. 435 F.2d. 26 (2d Cir., 1970).

POINT III

IT WAS IMPROPER AND IRRATIONAL FOR THE COURT NOT TO SENTENCE APPELLANT AS A YOUNG ADULT OFFENDER AFTER FINDING THAT HE WOULD BENEFIT BY SUCH TREATMENT

Appellant was convicted a few days prior to his 26th birthday; hence he was eligible for treatment as a Young Adult Offender [18 U.S.C. §5010, as extended by 18 U.S.C. §4209].

It is apparent from the record that the Court agreed that the judgment of conviction be timed so as not to preclude Young Adult Offender treatment:

> " As your Honor recalls, the conviction was returned about a day or so before Mr. Gonzalez' 26th birthday, and we arranged to have it timed that way, so he may be eligible to the sentence under the Youth Corrections Act, as a young adult offender."
>
> Minutes of Sentencing, 2/8/74 , at 3.

Moreover, the Court agreed to consider such treatment:

> "MR. BERMAN: Your Honor, Mr. Gonzalez' birthday is October 15th. He was born in 1947. At the time the conviction and the decision here was made it was prior to his twenty-sixth birthday and I do request that he be considered for a young adult offender treatment under 4209. That is under 5010 as extended....
>
> THE COURT: He is entitled to that consideration. The Court will consider it.
>
> Minutes of Pre-Sentence Hearing, 10/19/73, at 17.

Under §4209, which applies to a defendant who has attained his 22nd birthday but has not yet attained his 26th birthday, the standard for imposition of a sentence under the Youth Correction Acts is a finding by the court

> "that there is reasonable grounds to believe the defendant will benefit from the treatment provided....."
>
> 18 U.S.C. §4209

There can be no question but that the Court found that appellant would benefit from Youth Offender treatment. Specifically,at sentencing, the Court commented:

> "I am sure you can be a good, upstanding citizen there is no question about that."
>
> Minutes of Sentencing, 2/8/74, at 16.

Moreover, the Court, in sentencing appellant, suspended execution of sentence and placed him on probation. This is exactly the same treatment as is provided for defendants sentenced under 5010(a). The whole thrust of 5010(a) is to avoid a sentence of incarceration whenever such incarceration is not necessary.

It is evident that the Court that appellant in failing to report for induction relied in good faith on a substantive legal defense and had no desire to stigmatize him.

Hence it was clearly irrational and arbitrary for the Court after recognizing appellant's age eligibility and commenting om his potential as a useful citizen and obviously

finding that incarceration would serve no purpose, to refuse to sentence under 5010. The only possible explanation is that the Court, erroneously believed the sentence of probation under the regular statute to be the exact equivalent of a 5010 sentence.

Where there is no "present and visible rationality" of the reasons for a sentence;(United States v. Riley, 481 F.2d 1127, 1129 (D.C.Cir., 1973) and where the record shows a fixed and mechanical imposition of sentence (United States v. Brown, 470 F.2d 285 (2d Cir., 1972) appellate courts have not hesitated to remand for resentencing.

These defects are apparent in the record of appellant's case and mandate that the sentence be vacated and the case remanded for resentencing under the Youth Corrections Act.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED TO DETERMINE THE EXTENT OF ELECTRONIC SURVEILLANCE. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR RESENTENCING.

Respectfully submitted,

JESSE BERMAN
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New York, N.Y. 10013
[212] 431-4600

July 1, 1974

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARLENE F. BOOP, being duly sworn, deposes and says:

That on the 1st day of July, 1974, I served the within Appellant's Brief, Appellant's Appendix and Appellant's Exhibit Folder upon David Trager, attorney for the government in this action, at 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Arlene F Boop

Sworn to before me this
1st day of July, 1974.

Steven Bernstein

STEVEN BERNSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-4520522
Qualified in New York County
Commission Expires March 30, 1976